DISSENTING VIEWS
H.R. 3313, THE "MARRIAGE PROTECTION ACT OF 2003"

We strongly dissent from H.R. 3313, the so-called "Marriage Protection Act of 2003," which is not only unprecedented but also unconstitutional.

If H.R. 3313 is passed into law, it would constitute the first and only time Congress has enacted legislation totally eliminating any federal court from considering the constitutionality of federal legislation – in this case, the provision in the Defense of Marriage Act ("DOMA") that provides that states need not give full faith and credit to any same sex marriages entered into in other states.[1] At a time when not a single federal court has issued an opinion concerning DOMA, let alone striking it down, we believe it is inexcusable for Congress to attack the federal judiciary to score political points.

The operative language of H.R. 3313 constitutes but a single sentence. It provides:

> "[n]o court created by an Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question to pertaining to the interpretation of, or the validity under the Constitution of, section 1738C or this section."[2]

As such, the legislation effectively precludes any federal judicial review, either by a lower federal court or the Supreme Court, of any constitutional challenge to DOMA's validity. Instead, the bill relegates state courts to review any challenges to DOMA or H.R. 3313, creating the very real possibility of having differing legal constructions across the 50 states and the District of Columbia.

It is ironic that on the very day that Congress celebrated Justice John Marshall by authorizing a commemorative coin in his honor,[3] the Judiciary Committee would disparage him

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[1]Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (defining 'marriage' and 'spouse for the purposes of federal law, and purporting to permit states not to give full faith and credit to any marriage, or any legal relationship "treated as a marriage" under the laws of another state, territory, possession or tribe).

[2]28 U.S.C. § 1738C states that ""No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." DOMA, sec. 3, 110 stat. 2419.

[3]John Marshall Commemorative Coin Act, H.R. 2768, 108th Cong. (2004). In support of the legislation, the bill's sponsor, Rep. Spencer Bachus (R-AL), said, "John Marshall served as Chief Justice of the United States Supreme Court from 1801 to 1835, much of that time spent in this very building, holding the longest tenure of any Chief Justice in the Nation's history. He authored more than 500 opinions, including virtually all of the most important cases that the Court decided during his tenure. Under his leadership, the Supreme Court gave shape to the

by passing legislation that is totally inconsistent with Marshall's seminal legal opinion, *Marbury v. Madison.*[4] As emotionally charged and politicized as the issue of same sex marriage has become, we should not use that issue to permanently damage our courts, our constitution, and Congress. At a time when it is more important than ever that our nation stand out as a beacon of freedom, we cannot countenance a bill which undermines the very protector of those freedoms – our independent federal judiciary.

This unprecedented and dangerous legislation is strongly opposed by a variety of organizations, including the Leadership Conference on Civil Rights; the American Civil Liberties Union; People for the American Way; the Human Rights Campaign; Americans United for Separation of Church and State; Alliance for Justice; Human Rights Watch; Legal Momentum (formerly NOW Legal Defense and Education Fund); the National Asian Pacific Legal Foundation; National Conference of Jewish Women; PFLAG; Planned Parenthood; Pride at Work; AFL-CIO; and the American Federation of State, County, and Municipal Employees; among others.[5]

For these and the other reasons set forth herein, we dissent from H.R. 3313.

I. H.R. 3313 is Unconstitutional

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fundamental principles of the Constitution." 150 CONG. REC. H5781 (July 14, 2004).

[4] *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803).

[5] *See Letter to Members of the U.S. House of Representatives from Laura W. Murphy, Director, and Christopher E. Anders, Legislative Counsel, American Civil Liberties Union* (July 13, 2004); *Letter to Rep. F. James Sensenbrenner and Rep. John Conyers, Jr. from Rev. Barry Lynn, Executive Director, Americans United for the Separation of Church and State* (July 13, 2004); *Letter to Members of the U.S. House of Representatives from Cheryl Jacques, President, Human Rights Campaign* (July 13, 2004); *Letter to Members of the U.S. House of Representatives from American Civil Liberties Union, AFL-CIO, Americans for Democratic Action, Americans For Religious Liberty, American Humanist Association, Americans United For the Separation of Church and State, Central Conference of American Rabbis, DontAmend.com, Human Rights Campaign, Human Rights Watch, Leadership Conference on Civil Rights, Legal Momentum (formerly the NOW Legal Defense and Education Fund), MoveOn.org, The Multiracial Activist, National Asian Pacific American Legal Consortium, National Black Justice Coalition, National Council of Jewish Women, National Gay and Lesbian Taskforce, National Fair Housing Alliance Parents, Families and Friends of Lesbians and Gays (PFLAG), People For the American Way Planned Parenthood Federation of America, Pride at Work, Union for Reform, Judaism United Church of Christ Justice, and Witness Ministries, United States Students Association, Unitarian Universalist Association of Congregations, Women of Reform Judaism* (July 16, 2004); *Letter to Rep. John Conyers, Jr. and Rep. Jerrold Nadler from Ron Schlitter, Interim Executive Director, Parents, Families & Friends of Lesbians & Gays (PFLAG)*(July 14, 2004) [hereinafter *Group Sign-On Letter*].

While it is clear that Congress has the authority to regulate federal court jurisdiction,[6] it is also clear that such power is not plenary. Rather, the power is subject to other overarching constitutional rights, such as freedom of speech and equal protection. In this regard, one of the preeminent treatises on Constitutional Law concludes:

> There is little doubt that other constitutional provisions, like the equal protection clause, limit Congress's power under the Exceptions Clause. For example, Congress could not constitutionally provide that Republicans, but no one else, may have access to the Supreme Court. Such a provision would violate the first amendment and thus would be *independently* unconstitutional.[7]

Both of the constitutional scholars that testified at the Committee's hearings concerning court-stripping legislation agreed with this conclusion. The Minority witness, Professor Michael J. Gerhardt of William & Mary Law School, testified "Congress cannot exercise any of its powers under the Constitution – not the power to regulate interstate commerce, not the Spending power, and not the authority to define federal jurisdiction – in a manner that violates the Constitution."[8] Similarly, the Majority's witness, Prof. Martin H. Redish of Northwestern University School of Law, acknowledged that there were limits on Congress' Article III powers:

> To be sure, several other guarantees contained in the Constitution – due process, separation of powers, and equal protection – may well impose limitations on the scope of congressional power. The Due Process Clause of the Fifth Amendment requires that a neutral, independent and competent judicial forum remain available in cases in which the liberty or property interests of an individual or entity are at stake. . . . The constitutional directive of equal protection restricts congressional power to employ its power to restrict jurisdiction in an unconstitutionally discriminatory manner.[9]

A. Separation of Powers

In the present case, there are several constitutional requirements that are contravened by H.R. 3313. First, the legislation intrudes upon the long-standing principle of separation of powers between the branches of government. In the present case, by denying the Supreme Court its historical role as the final authority on the constitutionality of federal laws, the bill

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[6]Article III of the Constitution authorizes Congress to establish judicial power in lower federal courts, and to regulate the Supreme Court's appellate jurisdiction.

[7]STONE, SEIDMAN, ET AL., CONSTITUTIONAL LAW 85 (3d ed.) (emphasis added).

[8]*Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 108th Cong., 2d Sess. (Mar. 30, 2004) (testimony of Professor Michael Gerhardt) [hereinafter *Federal Court Jurisdiction Hearing*].

[9]*Federal Court Jurisdiction Hearing* (statement of Professor Martin Redish at 3-4).

unnecessarily and unconstitutionally usurps the Court's power.

Since the Supreme Court's historic ruling in *Marbury v. Madison*, the separation of powers doctrine has been well established. *Marbury* concerned the validity of a judicial commission that was signed, but not delivered prior to the end of John Adams' presidency. Justice Marshall agreed with President Jefferson that the commission should not be given effect, but he did so only by declaring unconstitutional the provision of the Judiciary Act of 1789 granting courts *mandamus* powers over these commissions. In so doing, the Court enunciated the principle of federal judicial review of federal laws. Marshall's opinion included the now famous declaration that "It is emphatically the province and duty of the judicial department to say what the law is." [10]

In the more than 200 years that have passed since this legal decision was issued, judicial review has served as the very touchstone of our constitutional system and our democracy. As the Congressional Research Service's chief authority on separation of powers stated, "*Marbury v. Madison* is famous for the proposition that the [Supreme] Court is supreme on constitutional questions."[11]

Unfortunately, the concept of separation of powers is being challenged by H.R. 3313, and its principal author, Rep. Hostettler. At the Committee's markup, Rep. John N. Hostettler (R-IN) admitted that he disagreed with *Marbury's* long established principal of federal judicial review:

Mr. Weiner:	Just so I understand the sponsor, do you believe that *Marbury v. Madison* was wrongly decided? Just so I understand where you are coming from.
Mr. Hostettler:	I believe that part of the case was wrongly decided. [Rep. Hostettler later makes clear that he supports the Court's decision to defer to President Jefferson regarding judicial appointments, but disagrees with the rationale it used – that the Supreme Court had the right to strike down the congressionally enacted Judiciary Act of 1789].
Mr. Weiner:	Judicial Review. Thank you. I yield back.

The failure – until now – of Congress to enact legislation totally eliminating federal judicial jurisdiction to review the constitutionality of federal statutes is evidence of the long deference and respect maintained by Congress for the principle of federal judicial review. In addition, several of the Supreme Court's own subsequent decisions reaffirm that Congress may not contravene the doctrine of judicial review.

Not too long after *Marbury*, the need for some federal judicial review in all cases was

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[10]Marbury v. Madison, 5 U.S. (1 Cr.) at 178 (emphasis added).

[11]LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 42 (5th ed. 2003).

further confirmed by Justice Story in *Martin v. Hunter's Lessee*, when he wrote, "the whole judicial power of the United States should be, at all times, vested in an original or appellate form, in some courts created under its authority."[12] That is to say, a federal court ought to be empowered to exercise judicial power on behalf of the United States.

H.R. 3313 also contradicts existing precedent on legislature's ability to restrict the power of the judiciary. For example, in *United States v. Klein*,[13] the only case in which the Supreme Court addressed directly the question whether the Congress could impose a legislative restriction on court power if framed in jurisdictional terms, the Court made clear that "the language [of the challenged law] shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end .... We believe that Congress has inadvertently passed the limit which separates the legislative from the judicial power."[14]

In an analogous vein, in *City of Boerne v. Flores,* the Court held that it is improper and unconstitutional for Congress to attempt to legislate its view of the free exercise clause of the First Amendment.[15] Also, in *Dickerson v. United States*, the Court struck down a federal statute narrowing the scope of statements held inadmissable under *Miranda v. Arizona*, 384 U.S. 436 (1966).[16] It is telling that as recently as this term, the Supreme Court rebuffed an attempt by the Executive Branch unilaterally to withdraw certain *habeas corpus* cases from the jurisdiction of the federal courts.[17]

Numerous esteemed legal scholars have emphasized that it would be a constitutional violation of separation of powers principles for Congress to seek to completely strip federal courts of jurisdiction over constitutional claims. The most noted of these views was put forth by Stanford Law Professor Henry Hart when he concluded that under *Marbury's* restrictions on federal jurisdiction are unconstitutional when "they destroy the essential role of the Supreme

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[12]14 U.S. (1Wheat.) 304 (1816).

[13]80 U.S. 128, 178 (1872).

[14]80 U.S. at 145.

[15]521 U.S. 507 (1997).

[16]530 U.S. 428, 432 (2000) ("Congress enacted 18 U.S.C. § 3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves.").

[17]*See* Rasul v. Bush, 542 U.S. ___ (2004); Hamdi v. Rumsfeld, 542 U.S. ___ (2004); Rumsfeld v. Padilla, 542 U.S. ___ (2004).

Court in the constitutional system."[18] More recently, Yale Law Professor Akhil Amar concluded that article III requires that "all" cases arising under federal law must be vested, either as an original or appellate matter, in a federal court.[19]

The views of these legal scholars concerning complete federal court stripping are consistent with the findings of the Task Force of the Courts Initiative of the Constitution Project, a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues through a unique combination of scholarship and activism. The Constitution Project concluded "legislation precluding court jurisdiction that prevents the judiciary from invalidating unconstitutional laws is impermissible. Neither Congress nor state legislatures may use their powers to prevent courts from performing their essential functions of upholding the Constitution."[20]

As a corollary, the Constitution Project found that Congress cannot vest jurisdiction in courts to enforce a law while preventing the same courts from reviewing the constitutionality of the same law, as appears to be the case with H.R. 3313. Their unanimous finding was that "the Constitution's structure would be compromised if Congress could enact a law and immunize that law from constitutional review."[21]

B. Equal Protection and Due Process

H.R. 3313 also violates the Fifth Amendment's protection of equal protection,[22] in that it imposes an undue burden on a specific class of individuals without a rational basis. The critical case in this regard is *Roemer v. Evans*, a 1996 Supreme Court decision invalidating a Colorado law preventing the state or any political subdivision from enacting legislation to protect gay and lesbian citizens from discrimination.[23]

Roemer held in a 6 to 3 decision by Justice Kennedy that it was unacceptable for the state

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[18]Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

[19]Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 BOSTON UNIV. L. REV. 205 (1985).

[20] Report of the Cizens for Independent Courts Task Force on the Role of the Legislature in Setting the Power and Jurisdictino of the Courts, reprinted in: The Century Foundation, *Uncertain Justice: Politics in America's Courts* 206, at 217 (2002).

[21]*Id.*

[22]The Fifth Amendment Due Process has long been interpreted to include a requirement of equal protection parallel to the requirement of the Equal Protection Clause of the Fourteenth Amendment. *See., e.g.*, Adarand Contractors, Inc. v. Pena, 515 U.S. 200 (1995).

[23]517 U.S. 620 (1996).

of Colorado to exclude a class of individuals from legal protections:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance .... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid form the government is itself a denial of equal protection of the laws in the most literal sense[24]

Absent a rational basis, the *Roemer* Court found that laws of this nature cannot stand. It found that such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[25] In *Roemer*, the general provision "that gays and lesbians shall not have any particular protection from the law, inflicts on them immediate, continuing and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[26] Specifically, the Court found the principal motivation for the legislation was animus towards gays and lesbians, which had no rational relationship to a legitimate governmental purpose; it concluded, "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[27]

These same concerns will no doubt invalidate H.R. 3313 on Equal Protection grounds should it pass into law. The record for this legislation is replete with animosity towards gays and lesbians[28] and distrust of federal judges.[29]

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[24] *Id.* at 633.

[25] *Id.*

[26] *Id.*

[27] *Id.* (citing Dep't of Agric. v. Moreno, 143 U.S. 528, 534 (1973)).

[28] "I am not worried about the high-school kids today, I am worried about the ones that are just born and those yet to be born that will grow into a society that they do not know the traditions that we have. They will be told, you don't know what you might be and what your preferences might be, so you ought to experiment with a number and settle on one or two or three, or rotate throughout a lifetime. They will be told that one relationship is as good as any other. They will have a menu of life far different than the one that we are talking about here, and that menu of life will encourage them to try to sample along that list. When that happens, you will see relationships form for reasons other than personal love. For example, there will be relationships formed because they want to access someone's 401(k)plan or somebody's health care plan or retirement plan or inheritance." *H.R. 3313 Markup* (statement of Rep. Steve King).

"Mr. Bachus. Mr. Chairman, I am that famous man to your left, I think, that he keeps referring to that is going to bring the John Marshall coin bill to the floor later this afternoon, and I want the record to show that I will be honoring Justice Marshall. I will not be marrying him. So—and with that——

As Professor Gerhardt noted in his testimony before the Committee, "distrust of 'unelected judges' does not qualify as a legitimate basis, much less a compelling justification, for congressional action."[30]

This is the same conclusion reached by the ACLU in their review of the legislation:

> The Marriage Protection Act – which derives from the same animus that motivated Colorado voters to pass the state amendment invalidated by the Supreme Court – is similarly unconstitutional. The sole objective of the Marriage Protection Act is to prohibit federal courts from reviewing the Defense of Marriage Act because some supporters of the Marriage Protection Act believe that the federal courts, including the U.S. Supreme Court, will find DOMA to be unconstitutional. Denying courts the ability to review a law for its constitutionality because of a concern that the law might be unconstitutional does not serve any legitimate purpose of government.[31]

Mr. Weiner. Imagine my relief.

Mr. Bachus. Thank you." *Id.* (colloquy between Reps. Bachus and Weiner).

[29]"The threat posed to traditional marriage by a handful of Federal judges whose decision can have an impact across State boundaries has renewed concern over the abuse of power by Federal judges." *H.R. 3313 Markup* (statement of Rep. Sensenbrenner).

"All Americans are entitled to a fair hearing before independent minded judges whose only allegiance is to the law. Too often we take for granted. But what should citizens do or their elected representatives when a few judges step out of bounds and try to change the rules of the game? Federal judges decide cases arising under the Constitution. However, over the last several years we have witnessed some judges wanting to determine social policy rather than interpret the Constitution. They seem to be legislators, not judges, promoters of a partisan agenda, not wise teachers relying on established law. . . . While judicial activism has existed since the founding of our Nation, it seems to have reached a crisis. Judges routinely overrule the will of the people and invent new rights and ignore traditional morality. Judges have redefined marriage, deemed the pledge of allegiance unconstitutional, outlawed religious practices and imposed their personal views on Americans." *Id.* (statement of Rep. Lamar Smith).

"Lord Acton once stated that 'power tends to corrupt, and absolute power corrupts absolutely.' No branch of the Government can be entrusted with absolute power; certainly not a handful of tenured Federal judges appointed for life. Those same judges should not be allowed to judge the extent of their own authority." *Id.* (statement of Rep. Steve Chabot).

[30]*Federal Court Jurisdiction Hearing* (statement of Professor Gerhardt at 2).

[31]*Letter to Members of the U.S. House of Representatives from Laura W. Murphy, Director, and Christopher E. Anders, Legislative Counsel, American Civil Liberties Union* 2 (July 13, 2004).

It is also possible that the courts will find that H.R. 3313 violates the Fifth Amendment's Due Process clause as well. As Professor Gerhardt noted, "a proposal excluding all federal jurisdiction may violate the Fifth Amendment's Due Process Clause's guarantee of procedural fairness."[32] This is because on its face the law denies federal courts the opportunity to review a federal law. Given the traditional expertise the federal courts have in reviewing the constitutionality of federal laws, relegating such claims to state court can hardly be considered a fair or rationale process.

II. H.R. 3313 Undermines the Federal Judiciary

Aside from the obvious constitutional flaws inherent in H.R. 3313, the idea of Congress unilaterally cutting off federal constitutional review constitute both a poor and dangerous legal precedent. The legislation not only degrades the independence of federal judges, but eliminates any possibility of developing a single uniform policy with regard to DOMA from the 50 state supreme courts.

Both of the legal scholars who testified at the Committee's hearings agreed that court-stripping legislation such as H.R. 3313 was inadvisable from a policy perspective. Professor Gerhardt testified that "a proposal excluding all federal jurisdiction regarding a particular federal question undermines the Supreme Court's ability to ensure the uniformity of federal law. . . . This allows for the possibility that different state courts will construe the law differently, and no review in a higher tribunal is possible."[33]

The Majority's witness, Professor Martin Redish, was even more blunt in criticizing the legislation:

> as a matter of policy . . . I . . . firmly believe that were Congress to [strip federal courts of jurisdiction in DOMA cases, it] would risk undermining public faith in both Congress and the federal courts. Due to their constitutionally granted independence and insulation from the majoritarian branches of the federal government, the judiciary possesses a unique ability to provide legitimacy to governmental action in the eyes of the populace. Congressional manipulation of federal judicial authority therefore threatens the legitimacy of federal political actions.[34]

Such a complete and unprecedented stripping of federal court jurisdiction would be totally at odds with the policy of checks and balances envisioned by the nation's founders. Contemporaneous writings by two of the nation's most important founding fathers – the principal drafter of the Constitution and Bill of Rights, James Madison, as well as the author of the Federalist Papers, Alexander Hamilton – indicate the importance they placed on a strong and

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[32] *Federal Court Jurisdiction Hearing* (statement of Professor Gerhardt at 10).

[33] *Id.*

[34] *Id.* (written statement of Martin Redish).

independent federal judiciary.

Thus, when there was disagreement at the constitutional convention regarding the need for lower federal courts, Madison insisted on provisions permitting their creation. He argued, "confidence cannot be put in the state tribunals as guardians of the national authority and interests."[35] Similarly, when he introduced the Bill of Rights in the First Congress, Madison again emphasized the importance of federal courts:

> [I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[36]

Alexander Hamilton also wrote about the importance of federal court jurisdiction. In Federalist Number 78, Hamilton emphasized the importance of an independent federal judiciary: "In a monarchy it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body."[37] In Federalist Number 81, Hamilton expressed further support for federal courts being the appropriate venue for federal issues, writing:

> But ought not a more direct and explicit provision to have been made in favor of the State courts? There are, in my opinion, substantial reasons against such a provision: the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union.[38]

Given the importance of developing a single national standard on constitutional questions and the fact that it was a state court that authorized same sex marriages in Massachusetts, it seems particularly odd that the Majority would seek to strip federal courts of their power in the context of DOMA. As People for the American Way and other non-profit advocacy groups noted in their letter to Congress:

> Ironically, while supporters of H.R. 3313 seek to assert greater congressional control over review of the laws it passes, making state courts the primary avenues for challenges to federal actions actually erodes Congress' control over judicial review. Unlike with the federal judiciary, Congress has no impeachment power

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[35] 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 27 (1937).

[36] 1 ANNALS OF CONG. 458 (Gales & Seaton ed.) (June 8, 1789).

[37] THE FEDERALIST NO. 78 (Alexander Hamilton).

[38] *Id.* No. 81 (Alexander Hamilton).

over state judges or authority to regulate state courts, and the Senate has no power to advise and consent in their selection.[39]

The legal precedent that will be set if Congress is permitted to simply "end run" the Bill of Rights by circumventing the federal courts could be far-reaching is adopted here. If this bill passes, we must ask, what other rights will next be placed at risk? The right to freedom of speech and religion? The right to vote? The right to privacy? Indeed, many of these proposals are already introduced in statutory form.[40] If H.R. 3313 passes into law, it truly could be open season on our precious rights and liberties. Moreover, if court stripping had been used in the past, the Court might never have overturned laws prohibiting inter-racial marriage[41] or permitting segregated education.[42]

It is no wonder that principled conservatives such as former Senator Barry Goldwater found court stripping legislation to be so repugnant. When court stripping legislation was proposed in the 1970's concerning school prayer, abortion, and busing, Senator Goldwater opposed them, warning that the "frontal assault on the independence of the Federal courts is a dangerous blow to the foundations of a free society."[43]

Efforts by Republicans to discredit our judiciary by painting it with the broad brush of "judicial activism" are both disingenuous and demeaning. Once we parse through the thick rhetorical fog surrounding this issue, it becomes clear that Republicans' real gripe is with the results, not the activist nature, of judicial decisions. As Roger Pilon, a Cato Institute Director, acknowledged, "examples of 'judicial activism' that are cited, turn out, when examined more closely, not to be cases in which the judge failed to apply the law but applied the law differently, or applied different law, to reach a result different than the result thought correct by the person charging activism."[44]

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[39]*Group Sign-On Letter*. It is particularly puzzling that the Majority is so bent on undermining federal judicial power with respect to constitutional law interpretations, while in other contexts it seeks to expand federal judicial power at the expense of state courts over matters such as state class action claims, state drug laws, and state abortion laws.

[40]*See, e.g.*, H.R. 3893 (regarding government exercise of religion, sexual orientation, and the right to marry); H.R. 3190 (regarding government exercise of religion); H.R. 3799 (regarding official acknowledgments of religious authority); and H.R. 2045 (regarding government recognition of the Ten Commandments).

[41]Loving v. Virginia, 388 U.S. 1 (1967).

[42]Brown v. Board of Educ., 347 U.S. 483 (1954).

[43]*See* Linda Greenhouse, *The Nation: How Congress Curtailed the Courts' Jurisdiction*, N.Y. TIMES, Oct. 27, 1996, §4 at 5.

[44]*Hearing on H.R. 1252, The Judicial Reform Act of 1997 and Federal Judicial Term Limits Before the Subcomm. on Courts and Intellectual Property of the House Comm. On the*

Republican "conservatives" are prone to assert that Supreme Court decisions protecting a woman's right to choose (*Roe v. Wade* [45]) and a child's right to attend school without being subject to compulsory prayer (*Engel v. Vitale*[46]) constitute judicial activism. They herald, however, as landmark examples of the Court restraining excessive legislative power those decisions that limit Congress's ability to provide affirmative action as a remedy to respond to racial discrimination (*Adarand v. Pena*[47]), ban guns in schools (*United States v. Lopez* [48]), require background checks before felons can purchase handguns (*Printz v. United States*[49]), and limit campaign expenditures (*Buckley v. Valeo*[50]).

Similarly, when a Bush I-appointed district judge enjoins an Oregon ballot initiative allowing for assisted suicide,[51] or a Reagan-appointed district judge dismisses a contempt order for violating the Freedom of Access to Clinic Entrances Act because the defendants lack the requisite "wilfulness" on account of their religious convictions,[52] we hear scant criticism from the right wing. But when federal courts in California have the temerity to suggest that referenda that deny alien children the right to an education[53] or prevent minorities subject to discrimination from benefitting from affirmative action may be illegal or inappropriate,[54] we hear storms of protest from the same conservatives.

III. H.R. 3313 is Unprecedented

Judiciary, 105th Cong. (1997) (written statement of Roger Pilon, Director, Center for Constitutional Studies, Cato Institute).

[45]410 U.S. 113 (1973).

[46]370 U.S. 421 (1962).

[47]515 U.S. 200 (1995).

[48]514 U.S. 549 (1995).

[49]521 U.S. 898 (1997).

[50]424 U.S. 1 (1976).

[51]Lee v. Oregon, Civil No. 94-6467-HO, 2 (D.Or. 1994).

[52]United States v. Moscinski, 952 F. Supp. 167, 170 (S.D.N.Y. 1997).

[53]League of United Latin Americans Citizens v. Wilson, 908 F. Supp. 755 (C.D. CA, 1995), *remanded* 131 F.3d 1297 (1997), *aff'd* 1998 U.S. Dist. Lexis 3418, (March 13, 1998) (holding California Proposition 187 unconstitutional).

[54]Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480, *rev'd* 122 F.3d 718 (1997) (holding California Proposition 209).

The fact that no other Congress has passed a law that totally eliminates the federal courts' ability to review the constitutionality of a federal law should give all of the Members pause when considering this legislation.

This empirical assessment was most recently reviewed and confirmed by Georgetown University Law Center Professor Mark Tushnet:

> [T]he very fact that Congress has *never* attempted to bar access to *all* federal courts when a person claims that a federal statute violates the Constitution is itself a matter of more than minor significance.[55]

The Majority attempts in vain to find precedent for H.R. 3313, but at the end of the day, they are left with the reality that a bill this far reaching and degrading to the federal judiciary has never been enacted into law.

The Majority attempts to justify H.R. 3313 through several short-sighted appeals. First, it asserts that total court stripping laws are supported by precedent enacted by the Congress. Second, they argue that such court stripping laws were envisioned by the founders. Neither of these assertions is correct.

The Majority points to several laws they believe to be precedents for H.R. 3313. As the following review indicates, in addition to being largely outdated, all of the precedents they cite are either misstated, constitute only partial restrictions on federal judicial review, or do not involve issues of constitutional review:

Daschle Brush Clearing Rider:[56] Most notably, the Majority claims that a rider to the 2002 Supplemental Appropriations Act authored by Senator Tom Daschle (D-SD) approving logging and clearance measures by the Forest Service in the Black Hills of South Dakota serves as a precedent for the enactment of H.R. 3313.[57]

The problem with this argument is that, while the rider restricted "judicial review" of "any [logging or clearance] action"[58] by the Forest Service, it did not restrict federal judicial

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[55]Letter from Mark Tushnet, Professor, Georgetown University Law Center, to the Honorable John Conyers, Jr., 2 (July 19, 2004) (some emphasis in original and emphasis added) [hereinafter *Tushnet Letter*].

[56]Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Acts on the United States, Pub. L. No. 107-206, § 706, 116 Stat. 820, 864 (2002) [hereinafter *706 Rider*].

[57]*See H.R. 3313 Markup* (statement of Rep. Sensenbrenner).

[58]*706 Rider* § 706(j). It must be noted that the express language of this bill is far broader than the language in the Daschle amendment. While the Daschle amendment precluded "judicial review" of any logging or clearance action, this bill would strip the federal courts of

review of the rider itself or its constitutionality. Indeed, the federal courts did review the validity of the rider,[59] and explicitly found that the "challenged legislation's jurisdictional bar did not apply to preclude Court of Appeals' review as to the legislation's validity."[60]

Judiciary Act of 1789:[61] The Majority also cites as precedent the fact that the Judiciary Act of 1789 did not permit the Supreme Court (or any other federal court) to review state supreme court decisions upholding constitutional challenges to federal laws.[62]

However, as Professor Tushnet points out, this does not prove the Majority's contention that federal judicial review can be ignored: "The underlying thought [at that time] was that the national interest was in ensuring that federal rights were adequately protected, and that interest was not impaired when a state court mistakenly *over*-protected federal rights. After a controversial decision in the early decades of the twentieth century, Congress came to the view that there was indeed a national interest in ensuring the *uniformity* in the interpretation of national law, and amended the statute regarding the Supreme Court's jurisdiction accordingly."[63] In any event, it is a far different thing to prevent individuals from having access to the federal courts in order to redeem their constitutional rights than it is to prevent states from appealing legal judgments that they lose against the federal government in their own state courts.

Cary v. Curtis:[64] The Majority also attempts to argue that a 19th century federal statute placing jurisdiction for *all claims* of illegally charged customs duties with the Secretary of the Treasury represents a precedent for federal court stripping. In upholding the statute, the Court stated that, under the statute, "it is the Secretary of the Treasury alone in whom the rights of the

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"jurisdiction" or "appellate jurisdiction . . . to hear or determine any question pertaining to" DOMA.

[59]Biodiversity Associates v. Cables, 357 F.3d 1152 (10th Cir. 2004).

[60]*Id.* at 1152. Furthermore, in that case, the Tenth Circuit Court of Appeals explicitly held that the legislation's restriction on judicial review was not absolute because it did not apply to the review of the "congressional act," but rather to review of "the Forest Service's acts authorized by the Rider." *Id.* at 1160. Notably, the court also held that Congress, in this instance, was acting pursuant to an express authorization under Article IV, §3, cl. 2, to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *Id.* at 1156.

[61]Act of Sept. 24, 1789, ch. 20, §§ 11, 12, 1 Stat. 73 (1789).

[62]*H.R. 3313 Markup* (statement of Rep. Sensenbrenner).

[63]*Tushnet Letter* at 1 n.2 (referring to Ives v. South Buffalo Railway Co., 94 N.E. 431 (N.Y. 1911) and New York Cent. R. Co. v. White, 243 U.S. 188 (1917)).

[64]Cary v. Curtis, 44 U.S. 236 (1845) (reviewing Act of 1839, ch. 82, § 2).

government and of the claimant are to be tested."[65] The Majority, however, misstates the decision.

In fact, the Court decided the case on the basis of sovereign immunity, not court stripping. The plaintiff was suing the government to recover allegedly improperly charged customs fees. The Court stated that: "the government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will resort to those courts as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions."[66] Thus, the language alluded to by the Majority regarding jurisdiction is mere *dicta*, and is not controlling. Additionally, *Cary* is distinguishable as a suit against the government for money, not a suit asserting that the law at issue violates an individual constitutional right.

The Francis Wright:[67] the Majority also points to another 19th century federal law restricting Supreme Court jurisdiction in admiralty cases to questions of law arising on the record.[68] The Court upheld the statute in *The Francis Wright* decision.

This case, however, in no way indicates that Congress may take a particular class of cases out of the Jurisdiction of *all* federal courts.[69] It merely deals with the uncontroversial claim that in cases involving admiralty jurisdiction, Congress may limit the appellate jurisdiction of the Supreme Court.[70]

Marathon Pipe Line:[71] the Majority also points to *dicta* from Justice Brennan's opinion in the Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* to the effect that matters that could be heard in Article III courts could also be heard in state courts.[72]

In point of fact, the actual holding in *Marathon Pipe Line* was that Congress, had invested unconstitutionally broad powers in the untenured judges who served in the newly created bankruptcy courts. The Supreme Court invalidated the entire statutory grant of jurisdiction to the new bankruptcy court system set up by the 1978 Act, holding that untenured

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[65] *Id.* at 241.

[66] *Id.* at 245.

[67] The Francis Wright, 105 U.S. 381 (1881) (analyzing Act of Feb. 16, 1875 , ch. 77).

[68] *See Federal Court Jurisdiction Hearing* (statement of Phyllis Schlafly).

[69] *The Francis Wright*, 105 U.S. at 381.

[70] *Id.*

[71] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[72] *See Federal Court Jurisdiction Hearing* (statement of Phyllis Schlafly).

judges could not, consistent with Article III, exercise the judicial power of the United States. Even in the *dicta* cited by the Majority, Justice Brennan was endorsing the possible constitutionality of partial restrictions on judicial review, rather than a complete bar on such review.[73] If anything, the *Marathon Pipe Line* decision stands for the sanctity of the federal judiciary, and the fact that Congress cannot easily give federal matters to judges who are not actual Article III judges appointed by the president and confirmed by the Senate.

Other federal statutes cited by the Majority, and its witness, Phyllis Schafly, all involve only partial limitations on federal court jurisdiction or do not implicate constitutional issues as H.R. 3313 does. These include the Norris-LaGuardia Act of 1932 (federal court actually found to have jurisdiction);[74] the Emergency Price Control Act of 1942 (appeals permitted to Supreme Court);[75] the Portal-to-Portal Pay Act of 1947 (deals with a restriction on liability, not a constitutional claim);[76] the 1965 Medicare Act (court stripping limited to administrative determination regarding fee schedule, not constitutional issues);[77] the Voting Rights Act of 1965

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[73]*Marathon Pipe Line Co.*, 458 U.S. at 50.

[74]Although characterized in Ms. Schlafly's testimony as having "removed from federal courts the jurisdiction [in cases involving labor strikes] from the federal courts, and the Supreme Court had no difficulty in upholding it," *Federal Court Jurisdiction Hearing* (statement of Ms. Schlafly), the Norris-LaGuardia Act did nothing of the sort. As the Supreme Court observed in *Lauf v. E.G. Shinner*, 303 U.S. 323 (1938), the District Court had jurisdiction to hear the case "by the findings as to diversity of citizenship and the amount in controversy."

[75]This legislation also did not strip the federal courts, or the Supreme Court, of equity jurisdiction to hear cases involving price orders. Section 204(a) of the Act allowed an individual whose protest against a price control ruling had been denied at the administrative level, to take an appeal to an Emergency Court of Appeals set up by subsection (c), and take a direct appeal to the U.S. Supreme Court under subsections (b) and (d).

[76]The section in question states only that "No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding ... to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment *with respect to an activity which was not compensable under subsections (a) and (b) of this section*." It is, at best, tautological to state that a court does not have jurisdiction to impose liability on an employer with respect to an activity that is not compensable.

[77]The section Ms. Schlafly cites, 42 U.S.C. § 1395w-4(i)(1), does not permit judicial or administrative review of certain factors to be taken into account in the setting of a fee schedule for the payment of physicians under the Supplementary Medical Insurance Benefits for Aged and Disabled. It is only with respect to those particular factors that go into the calculation of the fee schedule, that the restriction applies. The restriction does not apply to the fee schedules

(funnels cases into the district court for the District of Columbia);[78] and the 1996 Immigration Amendments (eliminates review of narrow set of discretionary actions by Attorney General, not constitutional issues).[79]

Second, the Majority asserts the founders would have expressed support for court stripping legislation.[80] In this regard, the Majority notes that authority such as Hamilton's Federalist No. 80 make clear that Congress has broad authority to rein in the federal courts. Properly read, Federalist No. 80 merely restates the Constitution's grant of authority with regard to the federal courts generally. It does not sanction efforts to eviscerate and degrade the federal courts themselves as H..R. 3313 does. In reality, as noted above, Hamilton was one of the principal supporters of a strong and independent federal judiciary of broad jurisdiction.

Conclusion

We oppose this unprecedented court stripping bill, which is nothing more than a modern day version of "court packing." Just as President Franklin Roosevelt's efforts to control the outcome of the Supreme Court by packing it with loyalists was rejected by Congress in the 1930s, thereby preserving the independence of the federal judiciary, so too must this modern day effort to show the courts "who is boss" fail as well.

We agree with then-President George Washington's warning concerning efforts to undermine the judiciary, when he stated:

> Let there be no change [in court powers] by usurpation; for it is through this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield.[81]

Justice Jackson echoed these warnings in 1943 when he held in *West Virginia Board of*

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themselves, much less to, as Ms. Schlafly put it, "administrative decisions about many aspects of the Medicare payment system."

[78]42 U.S.C. § 1973c places jurisdiction in the U.S. District Court for the District of Columbia, with a direct appeal to the Supreme Court. This was upheld by the Supreme Court in *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966).

[79]The limitation of jurisdiction in the 1996 immigration law is quite specific and circumscribed. It only bars judicial review of three discrete and discretionary actions – the Attorney General's decisions (1) to "commence proceedings," (2) to "adjudicate cases," or (3) to "execute removal orders." *See* Hatami v. Ridge, 270 F. Supp. 2d 763 (E.D. Va. 2003).

[80]*H.R. 3313 Markup* (statement of Rep. Tom Feeney).

[81]PRESIDENT GEORGE WASHINGTON, FAREWELL ADDRESS TO THE NATION (1796).

Education v. Barnette:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and official and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[82]

It is unfortunate that the Judiciary Committee would disparage these eloquent statements by passing legislation that is so totally inconsistent with judicial independence. We urge the Members to put principle above politics and reject this ill-advised and unconstitutional legislation.

John Conyers, Jr.
Howard L. Berman
Jerrold Nadler
Robert C. Scott
Zoe Lofgren
Sheila Jackson Lee
Maxine Waters
Martin T. Meehan
William D. Delahunt
Robert Wexler
Tammy Baldwin
Anthony D. Weiner
Adam B. Schiff
Linda T. Sánchez

[82] 319 U.S. 624, 638 (1943).